No. 167.
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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 167.

THE BOARD OF COMMISSIONERS, WILKES COUNTY, ET AL.,

Appellants,

vs.

W. N. COLER & CO.

SUPPLEMENTAL BRIEF FOR W. N. COLER & CO.

CHARLES PRICE,
Solicitor.

By leave of the Court we file this brief in answer to Supplemental Brief of Appellants' Solicitor.

In the first place, we call the attention of the Court to the far-reaching effect of the case of *Brodnax vs. Groom*, cited in our former brief, 64 N. C., 244. In construing the decision in that case this Court will do it in the light of the fact that the Court had then before it a tax act, to which Article II., Section 14, of the Constitution, applied.

This rule not only applies to Courts, but to the public, the legal profession, the corporate authorities, the legislative department of the State, the judicial department of the State, and to the bondholders.

In *Brodnax vs. Groom* the plaintiffs were taxpayers seeking an injunction against a tax alleged to have been levied by the defendants, the Commissioners of Rockingham County, under an act (1868-1869, Chapter 102, *ratified* April 1st, 1869,) which provided: "That the Commissioners of the County of Rockingham be, and they are hereby, authorized to levy and collect a special tax for the purpose of building and repairing bridges in said County."

The objections to the act were as follows:

1. That the act was private, and was passed without the notice required by the Constitution, Article 2, Section 12.

2. That the Act did not specify the amount to be collected, or the particular bridges to be built.

3. That the Act had not been approved by a majority of the voters in the County, as required by the Constitution, Article 7, Section 7.

4. That, of the amount levied, $1,200, the Commissioners had contracted a debt which it would require $10,000 to pay.

Now, it is to be noted that this was an application made to the Court *before* any one had acquired a vested right, and the contention was, the act was *unconstitutional and void.*

In the argument of this case every objection seems to have been urged against the validity of the Act, for

the Court, speaking through the Chief-Justice, PEARSON, says *it is not necessary to enter into the question*, as to whether the Act was passed according to the Constitution. He says the *ratification* makes it a matter of record, which cannot be impeached. He further says *that acts of the legislature, public or private*, which include *all acts*, are matters of record. The illustration he uses, in saying, "Suppose an Act of Congress is returned by the President with his objections, and the Vice-President and the Speaker of the House certify that it passed, afterwards, by the Constitutional majority, *is it open for the Courts to go behind the record, and hear proof to the contrary?*"

In making this illustration, the Chief-Justice must have intended to apply the rule to *every* case. Because, when we look at Article 1, Section 7, of the Constitution of the United States, we find this to be the only instance, the only case mentioned in the constitution, where "the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the Bill shall be entered on the journal of each House respectively."

This Court, in passing upon the right of a bondholder purchasing his bond in open market in due course of trade for value in good faith, with no suspicion of any "*defect of authority or other irregularity*" on the part of those acting for the County in issuing and offering for sale the bond, will place upon this decision, *Brodnax vs. Groom*, that construction which will uphold the bond and protect the innocent holder. The legislature of the State, in passing acts in a similar manner *many times* during a period of twenty-five years, and allowing the Counties to contract debts of a similar nature,

during that period, to the amount of more than a half million of dollars, must have put this construction upon that decision. The public for the same period put that construction upon it. The corporate authorities of the Counties, issuing the bonds for this period, put that construction upon it. The legal profession of the State for that period, many members of which being *at all times* members of the Legislature, *and constituting the judiciary committees of the Senate and House of Representatives*, put that construction upon the decision. If not, then as the legal advisers of the Legislature, *having acts of a similar kind exclusively in charge*, as such they were engaged in setting "traps for the creditors of the State," a thing not to be supposed, as said in the Travis County case by Mr. Justice BROWN, already cited in the former brief.

The purchasers of all these bonds so issued, from time to time, for this period in good faith, put this construction upon that decision.

The Judicial department of the State put this construction upon that decision, as seen by the cases cited in the former brief, for a like period; and the Executive department of the State likewise so understood this decision, as is shown in the investment of the funds of the University in these bonds, referred to in the supplemental brief of appellants' solicitor on page 24. The amount thus invested in the Wilkes bonds was in the sum of $8,000, and in the Stanley bonds $6,000, both considered most desirable securities.

On page 22 of the supplemental brief of appellants it is suggested that the allegation of collusion, as made in the complaint in this suit, is gratuitous, and unnecessary to be answered.

We will show that the case of *Commissioners of Wilkes County vs. Clarence Call et al.*, 123 N. C., 308, decided November, 1898, was not only collusive, but was no case at all. In this case there were no adversary parties, it being a proceeding gotten up for the purpose of repudiating an honest debt, with no suggestion upon the part of anybody that the bonds in question were not sold in open market, in good faith, by the corporate authorities of Wilkes County, to the purchasers of the same, who were unaware of any defect of authority or other irregularity on the part of those acting for the County; nor was there anything to excite suspicion of such defect or irregularity, if any existed.

It is not denied that the sum realized by the County in the sale of these bonds was appropriated to the payment of the County's subscription to the stock of the Company. It is admitted that the railroad was built at a large cost, and has been in satisfactory and successful operation for years. It is admitted that the bonds came into the hands of the purchasers—complainants--and the interest paid on the same for seven years before the case of *Commissioners of Wilkes County vs. Call* was begun.

It is not denied that the County of Wilkes, and the State of North Carolina, have levied and collected taxes from this railroad every year since its completion.

It is not denied that, in the building of this road the people of Wilkes County, have realized a long cherished hope and desire for transportation facilities to enable them to transport their products to the markets of the country.

Not only these things have been accomplished, but

it will not be denied that there has been a large increase in the value of the property of the County on account of the extension of this road within its limits.

The said case of *Commissioners vs. Call* was *begun* in the Superior Court of Wilkes County on the 23d day of December, 1897, one month *after* the decision of the case of *Commissioners vs. Snuggs*, in November, 1897, 121 N. C., 394.

In the *Snuggs case* (which we will call the *Stanly case* hereafter) there was no bondholder a party at any time, and the allegations in the complaint in that case were only against the Treasurer of the County, as they were, in the *Wilkes case*, only against the Treasurer of that County. Indeed, the point decided in the *Stanly case* was the same presented for decision in the *Wilkes case*. That is to say, it was sought to enjoin the Treasurer's paying the interest on the bonds of both Counties on the same ground—to wit, the failure to enter on the journals the yeas and nays, as already explained.

After the decision of the lower court in the *Wilkes case*, the defendant Call refused to appeal because the Supreme Court had, just before, decided the point in the *Stanly case*.

The plaintiffs in the *Wilkes case* tried to persuade him to appeal, and offered to pay the expenses of the same (See answer of Clarence Call, p. 20 of certified record).

After Call, the sole defendant in the case, *declined* to perfect his appeal from the decree entered on the 18th of February, 1898, J. M. Wellborn and J. M. Turner, by leave of the Court and consent of the plaintiffs, on the 8th day of March, 1898, and *after the time for perfecting the appeal had expired*, filed an

answer to the complaint, *in which complaint* there was no allegation made against them, nor was the complaint at any time amended, so as to embrace any allegations against Wellborn and Turner.

After the appeal was perfected, these parties, Wellborn and Turner, paid no further attention to the case (See dissenting opinion of Justice FURCHES, concurred in by the Chief Justice).

After the time had expired for perfecting the appeal from the decree of the 18th of March, the plaintiffs obtained, with the consent of Wellborn and Turner, another decree, *not dated, and not responsive to any of the allegations in the complaint,* from which the appeal, it is contended, was prosecuted.

So that, upon a close inspection of the record, the Supreme Court of North Carolina could have seen there was no case in that Court to decide.

How could an appeal from a decree of a Court, entered, as this one was, upon a complaint in which there was no allegation against them, no prayer for relief against them, be prosecuted by Wellborn and Turner, alleged holders of one bond? Why, may we inquire, would a *bona fide* bondholder want to become a party to a proceeding when the *Stanly case*, already decided by the Supreme Court, had adjudged a similar bond void?

In the light of these facts, it is impossible for the human mind to escape the conclusion that this *Wilkes case* was a collusive proceeding. Indeed, it was upon its face a nullity; no *case*, but a *proceeding* imposed upon the Supreme Court of North Carolina, if we may use such an expression, for the purpose of accomplishing a repudiation of an honest debt.

In view of all this it is insisted by the learned

counsel for the county that this Court is bound by the decision in case of *Commissioners of Wilkes County vs. Clarence Call*, one of the certified cases ! ! !

It is not pretended that any bondholder was before the Court in the case of *Commissioners vs. Snuggs*, 121 N. C., 394, another one of the cases mentioned in the certificate (Record, p. 42); nor is it so pretended in the case of *Rodman vs. Washington*, 122 N. Car. R., 39; nor in *Commissioners vs. Payne*, 123 N. Car. R., 432, also mentioned in the certificate.

So that the only case contained in the certificate in which a *bona fide* bondholder was before the Court is *Bank vs. Commissioners*, 119 N. C.

In this case we call attention to what is said in our former brief on pages 29, 30 and 31.

In favor of bondholders, such as these complainants are, this Court will adopt the rule laid down by the Court when it was first decided in 1895, quoted on page 29 of the former brief.

In further argument we will only call attention to the case of *City of Charlotte vs. Shepard*, 122 N. C., 602. This is a late case, and the Court, in speaking of the power to create a debt, &c., says: "When such a corporation has thus acquired the right to create the debt and to issue the bonds, this power carries with if the power to levy the taxes necessary to pay said bonds and the accruing interest thereon." We beg that the Court consider this case in connection with what is said in our former brief on pages 50, 51 and 52.

The other points suggested and matters argued in the Supplemental Brief of Appellants have all been disposed of in our former brief.

CHARLES PRICE,
Solicitor.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 167.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.

vs.

W. N. COLER & COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF W. N. COLER & COMPANY.

Reply to Arguments of Counsel for Appellants Respecting the Ordinance of the Constitutional Convention, Passed March 9, 1868, and as to the impeachment of enrolled Acts by legislative Journals.

The learned counsel for the appellants apparently has undertaken to argue that the railroad in aid of which the bonds in question in the present case were

issued was not authorized by the ordinance of the Constitutional Convention, passed March 9, 1868. We have clearly shown in our main brief (p. 13, *et seq.*) that it was so authorized, and respectfully refer the Court to the argument there set forth at length.

The Original Ordinance authorized the railroad in Wilkes County in aid of which the bonds were voted, independently of the Act of February 20, 1879.

We understand the learned counsel for the appellants to argue that the particular railroad constructed in Wilkes county, in respect of which the bonds in question in the present case were issued, was a new branch line, and was not authorized until the passage of the act of February 20, 1879. In making this argument, however, the learned counsel is clearly mistaken in his facts. The language of Section 1 of said ordinance of March 9, 1868, printed in the record in this case, pages 24 to 27, is

> " a railroad of one or more tracks from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, *to some point in the northwestern boundary line* of the state, to be hereafter determined, a company is hereby incorporated," etc.

Now, a glance at the map of the State of North Carolina shows that such a railroad to the " northwestern boundary line of the state " must necessarily pass near or through Wilkes county. The northwestern boundary line of the state is the line which is reached by going in a northwesterly direction " from some point on the North Carolina Railroad, between

the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson County, running by way of Salem and Winston, in Forsyth county." This is the main line of the railroad as contemplated by the said ordinance of March 9, 1868; and that railroad, in respect of which the bonds were issued in the present case, is a part of such main line of railroad. It is true that the said road has not been constructed, we believe, beyond the town of Wilkesboro, in Wilkes county, and that the point on the northwestern boundary line of the state has not yet been determined, as indeed it has not been necessary to determine it, because the railroad has not yet reached, or approached near to, that boundary line, and the said ordinance did not prescribe any limit of time within which the said road should be constructed to the said northwestern boundary line.

When Section 1 of the said ordinance said the "*northwestern* boundary line of the state," it meant precisely what it said. It did not mean the *northern* boundary line of the state, to which the learned counsel for the appellants pointed in his oral argument. Not only is this obvious from reading this express language of Section 1 of the ordinance, but it is also further obvious from the language of Section 13 of the said ordinance (Record, p. 27), as follows, to wit:

"Be it further ordained, That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia."

When, therefore, the Constitutional Convention meant the *northern* boundary line of the state, to wit, the line of the State of Virginia, it said so, and de-

scribed the line as "the line of the State of Virginia," which is a wholly different thing from the *northwestern* boundary line of the state, mentioned in Section 1 of the said ordinance.

Furthermore, the topography of the country is such that the line of railroad described in Section 1 of the said ordinance, to wit, "a railroad of one or more tracks from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state" must necessarily run up the valley of the Yadkin river through Wilkes county. This is the only natural and practicable route, and was the one intended and prescribed by the said ordinance of March 9, 1868. On either side of this Yadkin valley are high hills and mountains, and this Yadkin valley forms the natural and only proper route for a railroad from the points mentioned to the northwestern boundary line of the state. In view of these facts of physical geography, well known to the Constitutional Convention which enacted the ordinance, this Section 1 is in reality as specific as if the said Convention had prescribed in express terms that this road should go up the Yadkin valley through Wilkes county, mentioning that county by name.

But in order to hold that the said ordinance of March 9, 1868, authorized the construction of the railroad in Wilkes county, and the issue of the bonds in question in respect thereof, it is not necessary that the said line of railroad in Wilkes county shall be deemed

a part of the main line of the said road. Section 13 of the said ordinance above quoted, provides :

" That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surrey county, to the line of the State of Virginia."

The road in question is not a branch which runs from Winston and Salem by way of Mount Airy, but that was only one of the branches which the said Section 13 authorized the said company to construct. It was also authorized to construct other branches. Even if the said railroad in Wilkes county is to be regarded as a branch of said railroad (although, as we have shown above, it is to be regarded not as a branch, but as a main line), yet these bonds now in question were properly authorized by the said ordinance to aid in the construction of such branch.

The railroad in question is not a "branch," but a part of the main line originally authorized by the Ordinance of the Constitutional Convention passed March 9, 1868, but even if it were a branch the road was authorized and the bonds are valid.

It is argued by the learned counsel for the county, in his supplemental brief (pp. 4 and 5), that the act of February 20, 1879, was the first authority for the construction of this railroad in Wilkes county, in aid of which the bonds in question were issued. That this is not the fact we have abundantly shown in our main brief *(p. 13 et seq.)*. The learned counsel, however, says that the act of 1879 amends Section 13 of the original charter, by adding the words (Record, p. 29)

"and one of which [branches] shall be constructed from the town of Winston and Salem, up the Valley of the Yadkin, by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory in the county of Caldwell, which branch shall be known as second division." The learned counsel in one breath argues that this act of February 20, 1879, is invalid, because the ayes and noes do not appear on the House journal in the second reading, and in the next breath he argues that this railroad in Wilkes county is a *new* road, and was not authorized by the ordinance of March 9, 1868, because this act of 1879 speaks of this road as a branch. In regard to this argument it is to be remarked that there is no magic in the name "branch," and it is immaterial in the construction of, the ordinance of March 9, 1868, whether the act of 1879, passed ten years afterwards, and by a different body of men, speaks of this road as a "branch." The real question is whether this railroad was authorized by the ordinance of March 9, 1868. As to this fact there can be no possible question. It may be that the learned counsel might argue that this act of February 20, 1879, is valid under the constitution so far as authorizing the construction of the road in Wilkes county, but invalid so far as authorizing Wilkes county to issue bonds. This argument would necessarily proceed on the theory that the legislature would have passed part of the act of February 20, 1879, if it had known that the other part of the act would fail and be void under the constitution; in other words, that the parts of the act are separable. It is by no means certain that such a construction, holding different parts of the act separable from one another, can be permitted. The language is,

"one of which [branches] *shall* be constructed," etc., "in the county of Wilkes." Here, then, is a mandatory requirement upon the railroad company to construct this branch, and *non constat* the legislature would have passed this mandatory act if it had not also accompanied the same with power to Wilkes county to issue bonds to aid in the construction of such road in Wilkes county.

The learned counsel for the county must, therefore, either take the act of February 20, 1879, as valid in its entirety, or invalid in its entirety, and cannot resort to it for the purpose of supporting his argument in one respect and at the same time claim that the act is invalid under the constitution.

Furthermore, even if this railroad constructed in Wilkes county is a branch, it was authorized by Section 13 of the original ordinance, although that Section 13 of the original ordinance did not make it mandatory upon the railroad to construct the same, this mandatory provision being first inserted in the act of February 20, 1879, and even if this railroad in Wilkes county were to be called a "branch," it was, nevertheless, authorized by the said ordinance of March 9, 1868, and that ordinance authorized the issue of bonds to aid in the construction thereof.

The learned counsel for the county also in his brief (p. 10) mentions the fact that the ordinance of March 9, 1868, in Section 12 thereof, refers to the act incorporating the North Carolina and Atlantic Railroad Company, whereas the name of that company should be the Atlantic and North Carolina Railroad. This was obviously a mere clerical error. The company and the act intended were certain, as was held by the

Supreme Court of North Carolina in the said *Belo case*, 76 N. C., 489 (our main brief, p. 22), where the court expressly refers to Section 34 of the said act of 1852, which is printed in the record in this case (p. 31), and mentions the same as being a part of the act referred to in the said Section 12 of the ordinance of March 9, 1868. This decision was rendered long before the bonds in question in the present case were issued, and conclusive in the matter as respects the present bonds.

The learned counsel for the county in his supplemental brief, page 11, argues that the framers of the constitution of 1868 clearly intended to safeguard the interests of the counties by having the attention of legislators called sharply to any proposition to levy a tax upon counties represented by them. We would go even further and say that the framers of the constitution in 1868 clearly intended to safeguard the interests of the counties by requiring that the voters of the county should vote upon any proposition to levy a tax or incur a debt, except for necessary expenses. This was the means by which any undue taxation or undue incurring of debt was to be checked and regulated. The people of the county voted almost unanimously in favor of the issue of the bonds in the present case, and any attempt now by the learned counsel to argue that any great public policy announced in the constitution of 1868 has been disregarded is utterly without foundation.

Galloway case wholly inapplicable.

The learned counsel for the appellants cites the case of *Galloway vs. Chatham Railroad Company*, 63 N. C.,

147 (1869). That case arose under Article V., Section 4, of the constitution of North Carolina, quoted in our main brief, page 107, which section refers wholly to bonds issued by the *State*, and not at all to bonds issued by the counties, and its provisions are different from any provisions, either constitutional or statutory, relating to bonds issued by counties. The Court in that case held (p. 158),

"that the road provided for in the act of 18th December, 1868, is neither an unfinished road nor one in which the *State* had, at the adoption of the constitution [April 24, 1868], a direct pecuniary interest."

No such question arises under the constitutional provisions or legislation applicable to the Wilkes County bonds.

The question in the case of *Galloway vs. Chatham Railroad Company*, 63 N. C., 147, was whether, under Article V., Section 5 (now Section 4), of the constitution, the general assembly of North Carolina had the power to pass the act of December 18, 1868, eight months after the adoption of the constitution (April 24, 1868), authorizing *a new line of railroad*, and providing for the isssue of state railroad aid bonds, *without submitting the question to a vote of the people of the State.* PEARSON, C. J., states the question involved and decided in the case as follows:

(p. 151 :) "Under Article V., Section 5, a question is made 'Has the General Assembly power to create this debt of two millions in aid of the Chatham Railroad Company unless the subject be submitted to a direct vote of the people?'"

The constitution, Article V., Section 4 (our main brief, p. 107), provided that no such State bonds could be issued

"except to aid in the completion of such railroads as may be *unfinished at the time of the adoption of this constitution*, or in which the state has a *direct pecuniary* interest, unless the subject be submitted to a direct vote of the people of the state and be approved by a majority of those who shall vote thereon."

The precise question, therefore, in this *Galloway case* was whether the road in question, authorized December 18, 1868, eight months after the constitution was adopted, was an "*unfinished*" road "*at the time of the adoption of the constitution*" within the meaning of the said Section 4, and the Court held, of course, it was not. *No such question arises in the present case.*

The line of railroad into Wilkes County was clearly authorized by the original ordinance of the constitutional convention passed March 9, 1868, Sections 1 and 13, and was not like the line of railroad mentioned in the case of *Galloway vs. Railroad Company*, 63 N. C., 147, a new line of railroad.

Article V, Sections 6 and 7 of the Constitution Considered.

The learned counsel for the county in his supplemental brief, page 15, summarizes what he alleges to be defects of the enabling acts relied on. He says, for example:

"3. If the reference [in the ordinance of 1868] incorporates the sections [33 to 37 of the act of 1852], as claimed, still there is no statement of a special object, but an attempt to confer authority to run branches to every county in the state, and authorize every county 'on or near' any line located to subscribe." The learned counsel obviously refers here to Article V, Section 7 of the constitution, which provides: "Every

act of the General Assembly levying a tax shall state the special object to which it is to be applied." Now, considering this section of the constitution, it is perfectly obvious that the said ordinance of March 9, 1868, and Sections 33-37 of the act of 1852 (incorporated therein by reference), do state a "special object," namely, the Northwestern North Carolina Railroad, which is a railroad to run "from some point on the North Carolina Railroad between the town of Greensboro, in Guilford County, and the town of Lexington, in Davidson County, running by Salem and Winston, in Forsyth County, to some point on the northwestern boundary of the state." The tax is to be applied to the payment of the bonds issued by counties on or near the line of this railroad in aid of the said railroad. The special object of the tax is to aid in the construction of this designated railroad, by paying the principal and interest of bonds issued by counties along the line of the road.

The learned counsel attempts to argue as if Article V., Section 7 of the constitution provided, not that every act of the assembly levying a tax shall state the "special *object*" to which it is to be applied, but that every act of the General Assemby authorizing any county to levy a tax shall state the name of the county. The county is not the "special object." No such language exists in Section 7, and there is no foundation for any such construction of it.

The same thing is to be said of Article V., Section 6, of the constitution, which provides that the taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner with the state taxes and shall never exceed the double of the state tax, except for a "special purpose," and with

the "special approval" of the General Assembly. A "special purpose" is stated in the said ordinance of March 9, 1868, and the said sections 35-37 of the act of 1852 made part thereof, and the "special approval" of the Constitutional Convention was given to the levying of such tax.

Furthermore, as we have already stated in our main brief, neither of these sections 6 or 7 of Article V. applies to the said ordinance of the Constitutional Convention of March 9, 1868. On their face and by their very language both these sections apply only to acts of the "General Assembly."

Moreover, the question whether or not the tax for the issue of the bonds in the present case exceeds double the state tax is nowhere raised on the record in the lower courts. It does not anywhere appear that this county tax will exceed double the state tax, and therefore the arguments of the learned counsel on this subject have no application to the present case.

In addition to the foregoing, as we have shown in our main brief, page 96, even if these sections 6 and 7 of Article V. of the constitution could apply to the said ordinance of March 9, 1868, and even if it were necessary for the county to levy double the state tax, all this is a matter *in pais*, to be determined by the board of county commissioners before the bonds are issued, and cannot possibly affect the holder of these negotiable bonds.

Further (see our main brief, p. 96), these bonds would be valid as bonds even though there might be a limit upon the tax rate.

Ordinance does not conflict with Art. V., Secs. 6 and 7 of Constitution.

We understand the learned counsel for the appellants to suggest in his supplemental brief, page 9, that the said ordinance of the constitutional convention passed March 9, 1868, is invalid under the constitution, Article V., Sections 6 and 7. These sections are printed in full in our main brief, page 108. We show in our main brief, page 93, *et seq.*, that these sections of the constitution do not prohibit legislation such as exists in the code of North Carolina, Sections 1996–2000. All of these reasons apply in the case of the said ordinance of the constitutional convention passed March 9, 1868.

There are also several further reasons which apply in the case of the said ordinance, to wit:

1. These sections relate solely to *acts passed by the General Assembly* and not at all to an ordinance adopted by the constitutional convention. The language of Section 7 is, "every act of the *General Assembly* levying a tax" etc. The language of Section 6 is, "approval of the *General Assembly.*"

2. There is nothing in the record in the present case or in the questions certified by the Circuit Court of Appeals to show that the county tax necessary for the payment of the interest on these bonds would exceed double the state tax.

3. These provisions, Sections 6 and 7 of the constitution, were complied with in the ordinance of the constitutional convention of March 9, 1868, in this—to wit,

that the said ordinance did express "a special purpose" for which the tax should be raised—namely, to pay the principal and interest of the bonds to be issued in aid of this *particular railroad*, and this provision had the "*special approval*" of the Constitutional Convention in this ordinance relating *specially* to the Northwestern North Carolina Railroad. The said ordinance, in Section 12 thereof, by reference made Sections 33–37 of the act of 1852 (record, p. 31) a part of the said ordinance. Said section 36 provides:

"It shall be the duty of the authorities of such town and the justices of such county to levy such taxes annually on the pesons, lands and other personal property within such town and county as may be sufficient to pay the amount of such bond or bonds and the interest thereon," etc.

This provision complies with Article V., Section 7 of the constitution, which provides that "every act of the General Assembly levying a tax shall state the *special object* to which it is to be applied, and it shall be to no other purpose," and states a "special purpose" and gives a "special approval" within the provisions of said Section 6 of Article V. of the constitution.

4. Whether or not the county tax would need to exceed double the state tax is a matter *in pais* with which *bona fide* holder of negotiable municipal bonds has no concern.

5. Furthermore, on this point it is sufficient, indeed, it is conclusive, to refer this Court to the case of *Belo vs. Commissioners*, 76 N. C., 489, reprinted in our main brief, page 22, where the Supreme Court of North Carolina, in 1877, at the suit of a

bondholder, long before these Wilkes County bonds were issued, held valid the said ordinance of the constitutional convention passed March 9, 1868, and especially held *valid the tax provisions* by issuing a mandamus to compel the county of Forsyth, which had issued bonds thereunder, to provide for the payment of said bonds.

The learned counsel in his supplemental brief, page 10, quotes a part of Section 12 of the said ordinance of March 9, 1868, as if that were all that was in the said ordinance authorizing the issue of bonds by counties, and omits any reference to Section 2. Said Section 2 provides as follows, Record, page 25:

"Be it further ordained tnat the capital stock of said company may be created by subscriptions on the part of individuals, corporations and *counties* in shares of One Hundred Dollars."

Barksdale case wholly inapplicable.

The case of *Barksdale vs. Commissioners*, 93 N. C., 472, 475, and other cases, are cited in the brief of the learned counsel for the county (p. 12.) In the case of *Barksdale vs. Commissioners*, the Court held that the tax there attempted to be levied violated Article V., Section 1 of the constitution of North Carolina,—a section in no way involved in the Wilkes County bonds. It is legally impossible that any decision under Section 1 could involve or settle the meaning of Sections 6 and 7 of the same article. Said Article V., Section 1, is as follows:

"The General Assembly shall levy a capitation tax on every male inhabitant in the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at three hundred dollars in cash. The commissioners of the several

counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax combined shall never exceed two dollars on the head."

The facts of the case are stated by MERRIMON, J. (dissenting,) as follows:

(p. 477.) "The plaintiffs in their complaint, allege in substance, that the defendant commissioners, in conjunction with the justices of the peace of Sampson county, have levied, and the defendant sheriff is about to collect, a tax of 13 1-3 cents on the $100 valuation of property, and 40 cents on the pole, for the further support of public schools in that county, as allowed by the statute (Acts 1885, ch. 174, § 23); that this tax levy is in excess of 66 2-3 cents on the $100 valuation of property and $2.00 on the poll, and is therefore, as they insist, not allowed, but is in effect forbidden by Art. V., § 1, of the Constitution. The defendants admit the facts as alleged," etc.

The court held that this tax violated the said Article V., Section 1. It was apparently urged upon the court that, notwithstanding the tax there in question clearly violated Article V., Section 1, of the Constitution, such defect was cured by the provisions of Article V., Section 6, of the Constitution, as being a tax for a *county purpose;* for court went on to say (p. 475):

"The levy finds no support in § 6 of article V., for this is not one for a '*special purpose* and with the *special* approval of the General Assembly' **for county purposes.** The enactment is in general applicable to the whole State, and part of the general **State legislation in furnishing facilities for the education of its people."**

The court thus held that the tax there in question was not a *county* tax for a "*county purpose*" within the meaning of said Section 6 of Article V. of the Constitution, but a *state* tax.

The case of *Barksdale vs. Commissioners*, therefore, held that the tax there in question was contrary to Article V., Section 1, of the constitution, and void for *that* reason. The court says (p. 476):

"Our decision rests upon the interpretation heretofore repeatedly given to the clause that directs the imposition of a poll tax equal to that imposed upon property valued for taxation at three hundred dollars, by which the taxes are both thus associated and arrested, when, on the poll, they reach the maximum of two dollars."

That was the question involved and decided in the case of *Barksdale vs. Commissioners*. Having decided that the tax was not for a "county purpose" within Section 6 of Article V. of the Constitution, the further remarks of the court as to what had been the "*legislative* interpretation" of Section 6 of Article V. of the Constitution were unnecessary to its decision. But the court does not say that any legislative interpretation had been given, that Section 6 of Article V. of the Constitution required the passage of a special act or an act naming a particular county in cases where the county tax was to exceed double the State tax (as is contended by the learned counsel for the county); and it does not say that any *judicial* interpretation whatever had been given to that section of the Constitution. There was no question involved in that case or decided therein, or in any of the cases cited therein by the court, that taxes for "county purposes" could not be levied except under a special act. But even if there had been, the tax in question in the present case, under the ordinance of the Constitutional Convention, passed March 9, 1868, is (as is shown *supra*) a tax for a "special purpose," and with the "special approval" of the Constitutional Convention, if

these be necessary under Section 6, Article VI., of the constitution in the case of An Ordinance of a Constitutional Convention, and this ordinance states the "special object" to which it is to be applied, if such statement be necessary under Section 7, Article VI., of the constitution—these being stated by incorporating the said act of 1852, Section 36 of which specifically states them (See said section printed in record, p. 32).

The cases cited by the Supreme Court of North Carolina in *Barksdale vs. Commissioners*, 93 N. C., 472, 476, do not sustain, and were not intended by that court to sustain, the proposition of the learned counsel for the county in his Supplemental Brief (p. 12) that, under Sections 6 and 7 of Article V. of the constitution of North Carolina, it is necessary that a special act be passed, or an act naming a particular county, in order that the county taxes may exceed double the state tax.

No such proposition was involved in the case of *Brodnax vs. Groom*, 64 N. C., 244; nor the court did not lay down in that case any proposition that, in order that a county tax might exceed double the state tax, the particular county or counties must be named in the act granting the power to tax.

In the case of *Simmons vs. Wilson*, 66 N. C., 336, the court enjoined the tax because there was *no legislative authority whatever* for it, and the court says (p. 337):

"We think the commissioners had no right to exceed the double of the state tax, except:

"(1) To pay debts of the county legally contracted prior to the adoption of the present state constitution. There do not appear to be any of these.

"(2) When the tax is for a special purpose, and has been allowed by *an* act of the legislature."

Observe that there is nothing whatever said here by the court that such act of the legislature must be limited to a county or counties specially named. The court only says "*an* act of the legislature."

The case of *Mauney vs. Commissioners*, 71 N. C., 486, did not decide any such question as that for which counsel now cites it. The point there decided is stated by the court as follows (p. 491):

"We concur in his Honor's views as to the constitutional limitations and equation of taxation to be applied to the different orders of debt. They may be disregarded as to old indebtedness, but must be applied to the new."

The court means, by "old indebtedness," indebtedness incurred before the adoption of the constitution, and, by "new" indebtedness, indebtedness incurred after the adoption of the constitution. *No question was made as to the passage or validity of any act, general or special, under Sections 6 and 7 of Article V. of the constitution.*

In the case of *Trull vs. Commissioners*, 72 N. C., 388, the court states the decision as follows (p. 391):

"In order to pay the debts which were contracted prior to the constitution taxes may be levied without regard to the constitutional limitation or equation, but in regard to new debts both must be observed."

There was *no question made in this case as to the passage or validity of any act, general or special, under Sections 6 and 7, Article V., of the constitution.*

In the case of *French vs. Commissioners*, 74 N. C., 692, there was *no act involved, either general or special,*

passed under Sections 6 and 7, Article V., of the constitution, and no question whether any such act must be general or special. The court decided what was stated in the headnotes of the case as follows :

" Taxation for state and county purposes, combined, for the current and necessary expenses of the county government and new debts, cannot exceed the constitutional limitation. There is no limitation, however, of the power of taxation upon either state or county for the payment of their lawful debts created before the adoption of the constitution."

The court accordingly held (p. 699) " the state tax of 38 cents and the county tax of 28⅔ cents on the $100 valuation exhausted the constitutional limitation of taxation for current expenses, and that the tax of 37 cents on the $100 for the payment of the old debt was legal."

In *Cromartie vs. Commissioners*, 87 N. C., 134, the court decided what is stated in the headnote, as follows :

" 1. Where the fund raised by taxation is required to meet the necessary expenses of a county government, and no part thereof can be legally applied to the satisfaction of a debt, the commissioners, acting in good faith in the execution of their powers, cannot be put in contempt for failure to pay such debt.

" 2. But in such case an *alias* writ of *mandamus* should be awarded, to the end that any excess of revenue raised under the law may be applied to the debt.

" 3. The commissioners have no power to increase the levy beyond the constitutional limit *without legislative authority, given in advance.*"

In that case also there was *no act before the court, general or special, passed under Sections 6 and 7, Article V., of the constitution, and no question before that court*

whether such act, if it were passed, should be general or special.

These cases were not cited by the Supreme Court of North Carolina in the case of *Barksdale vs. Commissioners* for the support of the proposition now advanced by the learned counsel for the county—namely, that any act whatever which is passed under Sections 6 and 7, Article V., of the constitution, in order to enable a county tax to exceed double the state tax, must be special, and must name the particular county—but they were cited for the proposition which they support, and which is stated in the analysis of these cases here above given—that is, in the language of the court in *Barksdale vs. Commissioners* (p. 476):

"These cases settle the extent of the taxing power when exercised by the county authorities, and allow its restraints only to be disregarded when the tax is needed to meet obligations existing before the adoption of the constitution, by virtue of the constitution of the United States, and decide that the limitations do not apply to other municipal corporations erected by law." [This summary of these cases is omitted by the learned counsel for the county in his quotation, supplemental brief, p. 12.]

It is clear, therefore, that neither the said case of *Barksdale vs. Commissioners*, nor any of the cases cited therein, establish the proposition, or was intended to establish the proposition, that under Sections 6 and 7 of Article V. of the constitution, in order to enable a county to levy a tax exceeding double the state tax, a "special act" must be passed naming by name the particular counties which should levy the tax. No such decision had ever been rendered by the Supreme Court of North Carolina prior to the issue of the bonds now in question.

Ordinance of March 9, 1868, in full force and Unrepealed.

It is not claimed or pretended by the learned counsel for the county that the said ordinance of March 9, 1868, has been in any wise repealed, or that any attempt has been made to repeal it, by the legislative assembly, even if such repeal by the legislative assembly were possible. The proposition is made on page 21 of the said supplemental brief that there was necessity for new legislation. No argument, however, is there stated in support of this proposition. No reason is stated, either in the said supplemental brief or in the original brief of the learned counsel, why the said ordinance of March 9, 1868, is not in full force and effect. As we showed in our main brief, Article II., Section 14, of the constitution is in express terms addressed to the legislative body, and is prospective—"No law shall be passed", etc. *(See on this point our main brief, p. 42, et seq.).*

Ordinance of Constitutional Convention passed March 9, 1868, not inconsistent with Constitution. Section 7, Art. VII. of Constitution may be read as amending said Ordinance and Act of 1852, if necessary.

We have also shown in our main brief (p. 45) that the said ordinance of March 9, 1868, was of the same dignity as the constitution, and was operative *per se* by its own force, and that it could be maintained, if necessary, that no provision of the constitution of 1868 would operate to modify or repeal the said ordinance if there was any conflict between the two. But it is not neces-

sary in the present case to maintain that proposition, for the constitution is not in any wise inconsistent with the said ordinance. Article VII., Section 7, of the constitution, which provides, in substance, that a county shall not contract any debt, etc., except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein, might apply to, and operate directly upon, any county in the state, and thus, if necessary, be written in as an amendment to the said ordinance of March 9, 1868. That in such a case such a provision of the constitution operates to amend an existing charter passed by an act of the legislature see case of *East St. Louis vs. Amy*, 120 U. S., 600; also the case of *East St. Louis vs. People*, 124 Ill., 655.

In the case of *East St. Louis vs. Amy, supra*, the facts were as follows: In 1869 the legislature of Illinois had passed an act granting the city of East St. Louis power to issue $100,000 of bonds, and to levy a tax of three mills for the payment thereof. In 1870 the new constitution of Illinois went into effect, which, in substance, required that a municipal corporation issuing any bonds should, at or before the time of doing so, provide for the levy and collection of a sufficient tax to pay the interest on such bonds, and to pay the principal within twenty years. This Court held that this provision of the constitution of Illinois of 1870 *did not repeal the said authority granted by the said act of 1869*, but that it amended it, and that *this amendment was, in effect, written into the charter*, so that the $100,000 of bonds were still authorized to be issued; but that, instead of the three mill tax levy provided in the charter for the payment thereof, a tax levy sufficient for the full payment of

the interest and principal could be levied, as required by the constitution.

The Supreme Court of Illinois, in the case of *East St. Louis vs. People, supra*, decided the same question the same way, and cited with approval the opinion of this Court in *East St. Louis vs. Amy, supra*. See, also, to the same effect the case of *Neal vs. Delaware*, 103 U. S., 370, cited by this Court in *East St. Louis vs. Amy*, 120 U. S., 600, 603, *supra*, in which case it was held that the Fifteenth Amendment to the Constitution of the United States of itself, and without any action by the State, was written into the election law and into the jury law of the State of Delaware as an amendment thereof, and that *no new legislation* for this purpose was required by the State of Delaware, but that these election laws and the jury laws stood, and were in force, as thus amended by the Fifteenth Amenment to the Constitution of the United States.

The vote required by the Constitution of North Carolina, Art. VII., Sec. 7, was had for the bonds now in question (see our main brief, p. 48, *et seq.*). A vote of the people of the County was required also by the said Ordinance of March 9, 1868, and sections 33–37 of said Act of 1852 referred to in section 12 of said Ordinance. The vote which was had satisfied both said Art. VII., Sec. 7, of the Constitution, and the said Ordinance and said Act of 1852.

The learned counsel for the county (supplemental brief, p. 15) again repeats the error of Justice FURCHES, that in the *Hill* and *Belo cases* the subscription was made and the bonds were issued *before* the adoption of the constitution of 1868. It is difficult to understand why the learned counsel persists in repeating this

obvious error and basing any argument thereon. The facts are stated and the dates specifically given by the Supreme Court of North Carolina in the *Hill case*, 67 N. C., 367, quoted at length in our main brief (p. 19), and again in the *Belo* case, 76 N. C., 489, quoted at length in our main brief (p. 22). It cleary and unquestionably appears there that the subscription was not made until the *June term, 1868*, after the constitution adopted April 24, 1868, went into effect; and the bonds were not issued until after August 11, 1868, for they recite an act of that date.

The learned counsel, in his supplemental brief (p. 17), apparently takes the curious position that in the *Hill case* and *Belo case*, reprinted in our main brief (p. 19 *et seq.)* the Supreme Court of North Carolina made a "*grave mistake as to the very essence and nature of the authority relied on*," and that it is the duty of this Court now to correct the mistake made by the Supreme Court of North Carolina in these cases. The fact is, the Supreme Court of North Carolina, in the *Hill* and *Belo cases*, made no mistake, but correctly construed the said ordinance of March 9, 1868, as giving, *per se*, authority to issue bonds precisely like the bonds now in question; but even if the Supreme Court had made a mistake in the *Belo case*, that case would, under familiar principles, be conclusive in favor of the holders of the present bonds, since that case was decided long before the present bonds were issued, and at the time of their issuance there was not any decision against their validity, nor any decision in any way modifying or overruling the said *Hill* and *Belo cases*.

No "policy" of the State against Railroad Aid Bonds. Provision as to "unfinished" railroads applies only in case of State aid bonds.

The learned counsel for the county apparently attempts to make an argument that there was a *policy* of the State of North Carolina, as evidenced in the constitution of that state, adopted in 1868, against issuing railroad aid bonds by either the state or counties, except in aid of roads which were unfinished at the time of the adoption of the constitution. There was no such policy. The only policy was this—that no State bonds should be issued to aid any *new* railroads, unless there should be a vote of the people, but with such a vote the state could aid any railroad, whether it had been begun or not at the time of the adoption of the constitution. If the railroad had been begun and was unfinished at the time of the adoption of the constitution, state bonds might be issued in aid thereof without any vote of the people. *As to counties, there was no distinction made as to whether the road was finished or unfinished at the time of the adoption of the constitution.* A vote of the people of the county was required for the issuance of railroad aid bonds of a county in either case, whether a road had been begun or was a new railroad, and there was absolutely no distinction whatever made in the constitution between new roads and unfinished roads so far as respects county aid, and no such distinction existed in the Code, or in any other provisions of the statutes.

The Code Sections 1996-2000 give power to issue the Wilkes County bonds.

On pages 19 and 20 of his brief, the learned counsel for the county says, in substance, in regard to the Code provisions, Sections 1996 to 2000, originally adopted April 10, 1869, these are to be construed the same as the provisions in the constitution of the state, Article V., Section 4, in regard to the issue of railroad-aid bonds by the state, stating : " It was deemed a part of the policy of the state to place its subdivisions under the same restrictions as the state, by preventing them from aiding in the completion of a road not then begun." There is not anything in the Code or in any of the statutes or in the Constitution of the State which supports any such view. The significant language of Article V., Section 4, of the constitution of the state, as applied to *state* railroad-aid bonds, is purposely omitted when the constitution deals with *county* bonds in Article VII., Section 7, and is purposely omitted from the said provisions of the Code. The Supreme Court of North Carolina, in *Commissioners of Stanly vs. Snuggs*, 121 N. C., 394, committed an obvious and glaring error in holding that the same provisions applied to a *county* as to the *state*.

We may note in passing that the learned counsel for the county, in quoting Article V., Section 4, of the constitution of North Carolina in connection with his argument in respect of code sections 1996 to 2000 (Supplemental Brief, p. 18), omits the significant words " *a direct pecuniary*," so that he makes a clause in that section, as respects state aid, read " a railroad which may be unfinished at the time of the adoption of the

constitution, or in which the state has *an interest*," whereas that section of the constitution really reads, " except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this constitution, or in which the state has a *direct pecuniary* interest, unless the subject be submitted to a direct vote of the people of the state," etc. On this subject see our main brief (p. 98 *et seq.*), showing that the claim of the learned counsel—that a " direct pecuniary interest " is required in the case of *county* bonds—is erroneous, and also that the decision of the Supreme Court of North Carolina in the case of *Stanly County vs. Snuggs*, 121 N. C., 394, is plainly erroneous.

The learned counsel for the county, in his supplemental brief (p. 19), speaks of the case of *Stanley County vs. Snuggs*, 121 N. C., 394, and says, in substance, that in that case the words in code section 1996, act of April 10, 1869, " in the completion of any railroad in which the citizens of the county may have an interest " were construed as speaking of railroads *unfinished* at the time of *the passage of the act or the adoption of the constitution.* The fact is, the court, in the case of *Stanly County vs. Snuggs*, held that those words in the code were retroactive and went back to the time of the adoption of the constitution (April 24, 1868), although there was not a word or syllable in the said Code, or in the act of April 10, 1869, to indicate that they were intended to have any such retroactive effect. The learned counsel continues (p. 19, bottom) :

" It was deemed a part of the *policy* of the state to place its subdivisions under the same restrictions as the state, by preventing them from aiding in the completion of a road not then begun."

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The fact is that there was no "policy of the state" to prevent a county from aiding in the completion of a road not begun at the time of the adoption of the constitution, or at the time of the passage of the act of April 10, 1869, nor even to prevent the state from aiding such road. The restriction was that a county should not aid any road begun, or not begun, unless by a vote of the people. The restriction on the part of the state was less than this, to wit, the state was permitted, *without* a vote of the people, to aid any railroad which had been begun, and was permitted to aid *any* railroad (begun or not begun) *with* a vote of the people.

The learned counsel for the county, after omitting from his quotation of Article V., Section 4, of the constitution, the significant words "*a direct pecuniary*" [interest], which apply only to *state* railroad aid *without* a vote of the people, then goes on seriously to argue, on page 20, that the same direct pecuniary interest is necessary in the case of aid by a county, although neither the code nor the constitution makes any such provision. The bare statement of such an argument is enough to refute it.

But however this may be, it is obvious from the *Hill* and *Belo cases*, quoted in our main brief (p. 19 *et seq.*), that this railroad had been begun before the passage of the act of April 10, 1869.

Furthermore, whether or not the railroad had been begun before April 10, 1869, or even before the adoption of the constitution (April 24, 1868), was a fact *in pais* to be determined by the county commissioners before they issued the bonds, and not a matter with which the holder of these negotiable municipal bonds is concerned.

The enrolled Act cannot be impeached by the Journals of the Legislative Assembly.

The cases of *Brodnax vs. Groom*, 64 N. C., 244 (1870); *Gatlin vs. Tarboro*, 78 N. C., 119 (1878), and *Scarborough vs. Robinson*, 81 N. C., 409 (1879), established the general principle in North Carolina that the enrolled act ratified and signed by the presiding officers of both houses of the General Assembly is conclusive, and cannot be impeached by the journals. On this point see our main brief, page 63 *et seq.* They established the principle that the ratification and the signatures of the presiding officers, described by the Supreme Court of North Carolina in *Scarborough vs. Robinson*, 81 N. C., 409 (our brief, p. 69 and 70), make the enrolled act a " matter of record, which cannot be impeached before the courts in a collateral way." This means, of course, that it cannot be impeached at all. The legislature itself cannot impeach it, and there is no direct proceeding, either before the legislature or the courts, for impeaching it. These decisions cannot be read as establishing any other or lesser principle. The record, and the only record, provided for by the constitution is the enrolled act. Article II., Section 23, provides expressly for the signature by the presiding officers of both houses. This, as stated in the case above mentioned, and in *Field vs. Clark*, 143 U. S., 649, is for the purpose of authenticating the act as the complete and finished record made by the legislative body. Referring to Article II., Section 14, of the constitution, there is no provision in that section to the effect that if the yeas and nays are not entered on the journals, the law shall be void ; there is no declaration

there that the entry of these yeas and nays shall be a record ; there is no provision there or in any other part of the constitution of North Carolina as to how the journals of the legislative body shall be authenticated (as there is for the signing and authentication of the enrolled acts) ; there is nothing in the constitution to insure the correctness of the journals.

Furthermore, there is no such distinction made in the constitution as is attempted to be made by the learned counsel for the county and by the Supreme Court of North Carolina in its recent decisions—no such refinement as that a part of the directions contained in Article II. addressed to the legislative body are mandatory and must be complied with or the law is no law, and that certain other parts of these directions to the legislative body need not be complied with.

In the *Oxford case*, 119 N. C., 214 (1898), the *first case* in North Carolina in which it was held that the journals of the General Assembly could be used to impeach an enrolled act duly signed as required by Art. 2, Sec. 23, of the Constitution, the Supreme Court of North Carolina reached that conclusion by saying that Section 14, Article II., of the constitution, declared something which it does not declare. That is to say, the Court says (119 N. C., 221) :

" The journals offered in evidence showed affirmatively that the yeas and noes on the second and third reading of the bill were not entered on the journal; and the constitution, the supreme law, says that unless so entered no law authorizing the state, counties, cities or towns to pledge the faith of the state, or imposing any tax on the property," etc., " *shall be void.*"

This is the first case in which it was so held, and all the other cases in North Carolina mentioned in Ques-

tion 1 certified (Record, p. 42), simply follow it like sheep following the leader. We wish to emphasize, with all possible force, that the constitution does not say that if the yeas and nays are not entered upon the journal *any act shall be void.* If it so said, it would put the whole world on its guard. It only says in section 14, as in Section 23 of the same Article II., all of the commands of which are addressed to the Legislature and to it alone, that before bills shall be " passed into laws " certain things shall be done by the Legislature. This same Supreme Court of North Carolina says that, if the things required by Section 23 are not done or not entered on the journal, the enrolled and signed bill cannot be impeached by the journals; but, when they come to pass upon Section 14 in this *Oxford case*, they declare that if one of its requirements—to wit, the entry of the yeas and nays—is not entered on the journal of either house, this is fatal, although the requirement that the bill shall be read on three several days, they announce, if not complied with, is not fatal, but the enrolled and signed act is conclusive.

Such refinements to support this new doctrine of the Supreme Court of North Carolina in the *Oxford case* have nothing to recommend them. They are wholly at variance with the fundamental principles announced by that Court in *Brodnax vs. Groom*, and repeated and reapplied in several other cases by that Court before the bonds of Wilkes County were issued. In short, the signing required by Article II., Section 23, as constituting the bill and act a *record*, applies as well to bills falling within Section 14 as to any other bills. This is the more obvious because it was such a bill as this which was in question in *Brodnax vs. Groom.*

We conclude our discussion of this point by repeating and emphasizing that there is a vast difference between the requirement in this Section 14 that certain things shall be done by the Legislature, and the meaning imputed to that section by the Supreme Court of North Carolina that if these things are not done Section 14 declares that the *act shall be void.* It does no such thing!

The true view is that which is well stated by the Supreme Court of Mississippi in the case of *Ex parte Wren*, 63 Miss., 512 (our brief, p. 86), that all these provisions of Article II. are mandatory upon the legislative body, and to be enforced by that body, which is directly responsible to the people of the state for its conduct in observing them. According to the learned counsel for the county, and according to the recent decisions of the Supreme Court of North Carolina, an arbitrary distinction should be drawn between part of these directions of Article II., addressed to the legislative body, and other parts thereof. For example, Article II., Section 16, provides: "Each house shall keep a journal of *its proceedings.*" Observe, here is a requirement that there shall be kept a "journal of its proceedings." This means, of course, all the proceedings. This is just as imperative and just as mandatory as the entry of the yeas and nays on the second and third readings in the case mentioned, as provided in Article II., Section 14. So, also, Article II., Section 23, provides: "*All bills* and resolutions of a legislative nature *shall be read three times* in each house before they pass into laws." As the houses are required to keep journals of their proceedings, they ought, under this requirement, to keep a journal which will show that all bills are read three times. And yet the Supreme Court

of North Carolina, in the case of *Carr vs. Coke*, 116 N. C., 223, decided that it is not necessary that the journals should show that bills are read three times, and the Supreme Court of North Carolina in the more recent decisions cited in the certificate of the United States Circuit Court of Appeals in this case, page 42, still state that they adhere to the ruling in *Carr vs. Coke.*

Such an arbitrary distinction as to the different requirements of Article II. of the constitution of North Carolina cannot be supported on sound principle. It is contrary to the rule laid down in the case of *Brodnax vs. Groom* and *Scarborough vs. Robinson*, and utterly at variance with those decisions. The case of *Brodnax vs. Groom*, moreover, was not dealing with an ordinary act, but was dealing with *an act levying a tax*—an act which, under Article II., Section 14, of the constitution, was required to be read on three different days, and to have the yeas and nays on the second and third readings entered on the journals, and yet the Supreme Court of North Carolina, speaking with reference to that very tax act then before it says :

" We are of opinion that the ratification certified by the lieutenant governor and the speaker of the house of representatives makes it," [that is, makes the tax act which Article II., Section 14 required to be read three several times, and to have the yeas and nays entered on the journals of both houses] " a matter of record," etc.

Furthermore, in that case of *Brodnax vs. Groom*, to make the *principle the ground and foundation* of its decision perfectly clear, the Court says :

" There can be no doubt that the acts of the legislature, like journals of the court, are *matters of record, and the idea that the 'verity of the record' can be averred against in a collateral proceeding is opposed to all of the authorities.*"

The learned judge then puts a case under the constitution of the United States, Article I., Section 7, which provides that in case of a veto by the president and passage of a bill over such veto :

" In all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively."

We say the learned judge puts a case under this provision: He says (*Brodnax vs. Groom*, 64 N. C., 244, 247):

" Suppose an act of Congress is returned by the president with his objections, and the vice-president and the speaker of the house certified that it passed afterwards by the constitutional majority, is it open for the courts to go behind the record and hear proof to the contrary ? "

This shows conclusively that the learned judge who rendered the opinion in *Brodnax vs. Groom* laid down the rule, and intended to lay down the rule, so as to cover the case prescribed by Article II., Section 14, of the constitution of North Carolina, which required the yeas and nays to be entered upon the journal, as well as other cases of enrolled acts under the constitution of of North Carolina. In fact, the learned judge, as above stated, had before him at the time a tax act which required the yeas and nays to be entered under Article II., Section 14. In the face of these express declarations of the Supreme Court of North Carolina in *Brodnax vs. Groom*, there cannot be any possibility of doubt as to what the court decided and intended to decide in that case.

In addition, this case of *Brodnax vs. Groom* was understood by this court, by the court in Mississippi, by the learned Attorney-General who made the note to

Field vs. Clark, 143 U. S., 649, 677, and by the legislative body year after year, and by the legal profession generally, to hold that the enrolled act is conclusive and cannot be impeached by the journals.

The Classification Attempted by the Learned Counsel for the County.

The classification attempted by the learned counsel for the county in his supplemental brief, page 3, is wholly without foundation in the decisions of the Supreme Court of North Carolina rendered prior to the time when these bonds were issued. All these decisions really proceeded upon the fundamental proposition decided in *Brodnax vs. Groom*, that the enrolled act is conclusive and cannot be impeached by the journals. No such arbitrary classification is made either by the constitution itself or by any of the decisions. The learned counsel states his third class as follows (his supplemental brief, p. 3.):

"Where there is a command or a prohibition to do or not do a thing, and a requirement that the evidence of the proceeding shall be preserved in a particular case, as in that at bar."

As has been stated above, the requirement of Article II., Section 16, is that, each house shall keep a journal of its proceedings. Article II., Section 23, provides: "All bills and resolutions of a legislative nature shall be read three times in each house." How, then, can the learned counsel say that this does not make a command upon the legislature to keep a journal of its proceedings, and to have such journals show that each bill is read three times. This is a command precisely

as much as is the command in Article II., Section 14, as to the reading of a bill on three days, and the entry of the yeas and nays.

Any one reading the decisions cited by the learned counsel for the county in his brief (p. 3) in support of his so-called classifications, and reading further the case of *Brodnax vs. Groom*, would certainly be surprised to learn that these cases had warranted any such classification of the different requirements of Article II. of the constitution of North Carolina. On the contrary, those cases all proceed, as stated, upon the fundamental proposition announced in *Brodnax vs. Groom*, that the enrolled act—in that case a tax act—is conclusive and cannot be impeached by the journals.

Supervisors vs. Post, 94 U. S., 260, and Post vs. Supervisors, 105 U. S., 667, are not like present case.

The cases of *Supervisors vs. Post*, 94 U. S., 260, and *Post vs. Supervisors*, 105 U. S., 667, cited by the learned counsel for the county in his supplemental brief (p. 1), are the same cases as *Ottawa vs. Perkins*, 94 U. S., 260, and *Amoskeag Bank vs. Ottawa*, 105 U. S., 667, referred to in our main brief (p. 11), construing the constitution of Illinois, and following a decision of the Supreme Court of that state rendered long *before* the bonds there in question had been issued, and not rendered after bonds were issued, as were the decisions in the Supreme Court of North Carolina mentioned in the certificate of the Circuit Court of Appeals in the present case (Record, p. 42). The cases of *Board of Commissioners vs. Coler*, 96 Federal Reporter, 284, and *Board of Commissioners vs. Union Bank*, 96 Federal

Reporter, 293, also cited by the counsel for County (Supplemental brief, p. 1), were rendered by the Circuit Court of Appeals of the Fourth Circuit, when they were under the impression that they were bound to follow the recent decisions of the Supreme Court of North Carolina, cited in the certificate (Record, p. 42).

State vs. Patterson, 98 N. C., 660, not like Present Case.

The principle stated by the Supreme Court of North Carolina in *State vs. Patterson*, 98 N. C., 660, quoted in the supplemental brief of the learned counsel for appellant (p. 2)—to wit, that a requirement of the constitution was mandatory—is, of course, correct as stating a general principle. The requirements of Article II. of the constitution of the State of North Carolina of 1868 are mandatory as addressed to the legislature, but the language quoted from *State vs. Patterson* does not decide anything, one way or the other, whether the enrolled act can be impeached by an examination of the journals of the legislature. In the case of *State vs. Patterson*, there mentioned, it was held merely that a statute without an enacting clause prescribed by the constitution, Article II., Section 21, is void. *This defect, of course, appeared upon the face of the enrolled act*, so that there was no question in that case of resort to the journals to impeach the act.

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